SUPREME COURT, U. S.

APR 18 1972

MICHAEL RODAK, JR., CLERK

71-1344

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1971

NO. A-971

MICHAEL DE TORE,
Also Known As MICHAEL
HAYS, Petitioner

v.

UNITED STATES OF
AMERICA, Respondent

PETITION FOR A WRIT
OF CERTIORARI TO THE
UNITED STATES COURT
OF APPEALS FOR THE
SECOND CIRCUIT

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April 17, 1972

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SECOND CIRCUIT

The petitioner Michael De Tore respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding

on February 18, 1972.

The judgment affirmed a judgment of the United States District Court for the Eastern District of New York, (a) convicting petitioner of the crime of armed bank robbery, in violation of 18 U.S.C. section 2113(d) and 18 U.S.C. sec. 2 (the bank's deposits were insured by the Federal Deposit Insurance Corporation; see 18 U.S.C. section 2113, subd. "f"), and (b) sentencing him to ten (10) years in prison.

A copy of the judgment is set out in the Appendix hereto.

NO OPINION BELOW

The Court of Appeals for the Second Circuit, in entering its judgment, did not render an opinion.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on February 18, 1972.

On March 20, 1972, petitioner filed with the Clerk of this Court an application addressed to Honorable Thurgood Marshall, an Associate Justice of this Court, for a 30-day extension of the time of petitioner to file a petition for a writ of certiorari to review said judgment.

On March 21, 1972, Mr. Justice Marshall extended the time of petitioner to file a petition for writ of certiorari in this cause to and including April 18, 1972. This petition for such a writ is being filed by said date.

This Court's jurisdiction is invoked under 28 U.S.C. section 1254(1)

and Rules of this Court, Rule 22 (2).

QUESTIONS PRESENTED

1. Whether the common, every-day practice in criminal cases followed in all federal, as well as state, courts throughout the country, of postponing the sentencing of a defendant who has pleaded guilty but is to testify against a co-defendant, until after the conclusion of the trial of the co-defendant, violates the right of the said co-defendant to a fair trial, vouchsafed to him by the due process clause of the Fourteenth Amendment to the Constitution of the United States, in that, in considering and determining the issue whether the guilty-pleading defendant has or has not been promised consideration with respect to his sentence in exchange for his cooperation (the witness

invariably denies any such arrangement), the trial jury is effectively deprived of information relevant and material to said issue - namely, the nature and extent of the sentence ultimately imposed upon the guilty-pleading defendant, and the relationship thereof to the punishment which can be visited upon him.

2. Whether the violation of the due process clause referred to in "1" above amounts to "plain error" "affecting" the "substantial rights" of a defendant, within the meaning of Rule 52(b) of the Federal Rules of Criminal Procedure, which a Court of Appeals may notice, as well as "plain error", within the meaning of Rule 40(1)(d)(2) of the Rules of this Court, which this Court may notice.

3. Whether it is in conflict with the holding of this Court in Miranda

v. Arizona, 384 U.S. 436, as explicated in Harris v. New York, 401 U.S. 222, as well as the holding in Harris, supra, for a federal district court judge, in the trial of a criminal case, to do any, some or all of the following related things, each of which is admittedly seriously prejudicial to defendant:

(a) the trial judge permits the prosecutor, notwithstanding the fact that the government in its case-in-chief had not adduced any evidence concerning such subjects, to cross-examine the defendant respecting (I) the giving to him by an F.B.I. agent, preliminary to interrogation of "Miranda" warnings, (II) defendant's response to said warnings, (III) the interrogation of the defendant by said agent, and (IV) the giving to said agent, by the defendant, in response to said interrogation, of statements and

admissions relating to the crime charged in the indictment;

(b) the trial judge conducts a "Miranda" hearing, prior to, during which, and at the conclusion of which, he advises defense counsel that, if the defendant takes the stand at said hearing, he, the trial judge, will not believe anything that the defendant says, to which defense counsel responds, and the trial judge agrees, that defendant's taking the stand will thus constitute an exercise in futility, and defendant does not take the stand;

(c) the trial judge, after receiving, during the "Miranda" hearing, the testimony of the agent who interrogated defendant, concerning the giving by him to defendant of "Miranda" warnings, and defendant's response thereto - and no other testimony - the trial judge makes a

finding that the "Miranda" warnings were given to defendant;

(d) the trial judge then permits the government to call the agent who questioned the defendant, as a rebuttal witness, and permits the agent to give evidence concerning "Miranda" warnings allegedly given to the defendant, the ensuing interrogation, and defendant's alleged admissions and statements; and

(e) the trial judge permits the jury to consider said evidence, notwithstanding the fact that the agent, who did not orally advise defendant of his "Miranda" rights, but merely exhibited to him a paper specifying said rights, failed, in his rebuttal testimony, to give any evidence concerning defendant's response to the exhibition of said paper, so that the agent failed to give any evidence either that the defendant understood the warn-

ings or waived his rights with respect thereto.

4. Whether it is in conflict with the holding of this Court in Bollenbach v. United States, 326 U.S. 607, as well as the holdings in Pinckney v. United States, 352 F 2nd 69, 70 (5 Cir., 1965) and United States v. Braxton, 417 F 2nd 878, 880 (5 Cir., 1969), for a federal district court judge, in a criminal case, in response to the jury's post-charge request for all the testimony concerning a vital issue in the case, which was given by three witnesses, and eked out by a stipulation as to certain facts involving a fourth person, some of which testimony and evidence was unfavorable to defendant, while other portions were favorable to him - for the trial judge, in response to the jury's request for all of this evidence, to do the following: With-

out pausing to locate and examine in the trial transcript - a copy of which is in the courtroom - the requested testimony (embodied in 39 widely scattered portions of the record) and stipulation, he proceeds to give the jury a summary, or purported summary of same, which (1) digests, or purports to digest, the testimony of only two of the three witnesses referred to, (2) makes no reference to the stipulation, (3) is "blind" in nature - that is, the judge, in his summary, says "one witness stated....." (sic)"and the other witness said ....." (sic), without, however, naming or otherwise identifying for the jury either of said witnesses, (4) is incomplete to the point of fragmentariness, and (5) while making reference to certain portions of the requested testimony which were unfavorable to defendant, omits any reference to virtually all those portions of the requested

testimony and stipulation which were favorable to defendant.

Within half an hour of receiving the summary - the last word on the case which the jury gets from the judge - the jury returns a verdict finding defendant guilty.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 18, section 2113, in so far as pertinent, read and reads as follows:

> "Bank robbery and incidental crimes.
>
> (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association .....

Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; .....

.....

(d) Whoever in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

.....

(f) As used in this section the term "bank" means any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution organized or oper-

ating under the laws of the United States, and any bank the deposits of which are insured by the Federal Deposit Insurance Corporation."

United States Code, Title 18, Section 2, read and reads:

"Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

Title 18, U.S. Code, Section 5010, entitled "Sentence", in so far as pertinent, read and reads:

"(a) If the court is of the opinion that the youth offender does not need commitment, it may suspend the imposition or execution of sentence and place the youth offender on probation.

(b) If the court shall find that a convicted person is a youth offender, and the offense is punishable by imprisonment under applicable provisions of law other than this subsection, the court may, in lieu of the penalty of imprisonment other-

wise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter until discharged by the Division as provided in section 5017(c) of this chapter.....

....."

U. S. Code, Title 18, section 5017, entitled, "Release of youth offenders", in so far as pertinent, read and reads as follows:

"(a) The Division may at any time after reasonable notice to the Director release conditionally under supervision a committed youth offender. When, in the judgment of the Director, a committed youth offender should be released conditionally under supervision he shall so report and recommend to the Division.

(b) The Division may discharge a committed youth offender unconditionally at the expiration of one year from the date of conditional release.

(c) A youth offender committed under section 5010(b) of this chapter shall be released

conditionally under supervision on or before the expiration of four years from the date of his conviction and shall be discharged unconditionally on or before six years from the date of his conviction.....

....."

RULES OF THE SUPREME COURT INVOLVED

Rule 40(1)(d)(2) of the Rules of this Court, entitled, "Briefs - in general", reads, in so far as pertinent:

"Questions not presented according to this paragraph will be disregarded, save as the court, at its option, may notice a plain error not presented."*

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* Although the rule relates to briefs, it appears to be applicable to petitions for certiorari. Stern and Gressman, Supreme Court Practice (Fourth Ed.; 1969), p. 299.

FEDERAL RULES OF CRIMINAL PROCEDURE INVOLVED

Title 18, U.S.C., Federal Rules of Criminal Procedure, Rule 52(b), read and reads as follows:

> "Plain error.
>
> Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

STATEMENT OF THE CASE

The Indictment

The indictment in this case (reproduced at A-8 to A-9*) reads as follows:

---

*Numbers prefaced by "A-" refer to pages of petitioner's Appendix in the Court of Appeals.

"THE GRAND JURY CHARGES:

On or about the 8th day of February, 1971, within the Eastern District of New York, the defendant STUART MARK SIMON and the defendant EUGENE SCHWARTZ, aided and abetted by the defendant HIRAM JESUS BERENGUER, JR., and the defendant MICHAEL DE TORE, also known as Michael Hays, knowingly and wilfully by force, violence and intimidation took from the persons and presence of employees of the Eastern National Bank, 205 Hallock Road, Lake Grove, New York, approximately Twelve Thousand Seven Hundred Forty Five Dollars and Fifty Five Cents ($12,745.55) in United States currency, which money was in the care, custody,

control and management of the aforesaid bank, the deposits of which bank were then and there insured by the Federal Deposit Insurance Corporation, an act and offense in violation of Section 2113(a), Title 18, United States Code, and in the commission of this act and offense, the defendant STUART MARK SIMON and the defendant EUGENE SCHWARTZ, aided and abetted by the defendant HIRAM JESUS BERENGUER, JR., and the defendant MICHAEL DE TORE, also known as Michael Hays, assaulted and placed in jeopardy the lives of said bank employees as well as the lives of other persons present by the use of dangerous weapons. (Title 18, United States Code

Section 2113(d) and 2)."

A TRUE BILL

Steven Pappas

Foreman

Edward R. Neaher

United States Attorney"

The status, at the time of the trial of petitioner (who was tried alone), of the other defendants named in the indictment, two of whom pleaded guilty and testified against petitioner.

The defendant HIRAM JESUS BERENGUER, JR., who was not present at the trial of petitioner.

After being released on bail

following his arrest, the defendant BERENGUER fled the jurisdiction, and was still a fugitive at the time of the trial of petitioner (A-1, A-2, A-3, A-4).

He was apprehended and returned subsequent to the trial (A-3).

Thereafter he pleaded guilty under a lesser charge - bank robbery (but not armed bank robbery) - which omitted the allegations of the indictment concerning assault and the use of weapons (papers on file in office of Clerk of District Court for Eastern District of New York).

Subsequently, he was sentenced to six years in prison (papers on file in office of said Clerk).

The defendant EUGENE HOWARD SCHWARTZ, who pleaded guilty and testified against petitioner.

Prior to the trial, the defendant SCHWARTZ had pleaded guilty to a superseding information charging an offense less than that alleged in the indictment - namely, larceny of the money taken, in violation of 18 U.S.C. sec. 2113, sub. "b" (A-1, A-2, A-62; minutes of March 15, 1971, p. 15).

The defendant STUART MARK SIMON, who pleaded guilty and testified against petitioner.

The preceding references to the defendant SCHWARTZ apply also to the defendant SIMON (A-1, A-2, A-63; minutes of March 15, 1971, p. 15).

The government's case

The aborted plan of February 3, 1971.

Schwartz and one JOHN PETERS, testified that on February 3, 1971, at petitioner's home, petitioner conferred with them and the defendant Berenguer, and, according to Peters, another man, who was not identified and was not called as a witness (Minutes of April 7, 1971, 2 P.M., 5-13, 16-22;* 303-311).

Schwartz and Peters testified that petitioner described to them the physical lay-out of the bank, outlined the plan for robbing it, and supplied

---

*There are two (2) volumes of transcripts for April 7, 1971; one, labeled "10 o'clock A.M." (sic), with the pages numbered 1-15, contains the government's opening; the other, labeled "2.00 o'clock P.M." (sic), with the pages numbered 1-200, contains testimony. Numbers beyond 15 refer to post-opening pages of the trial transcript.

Schwartz and Peters - who were to enter the bank and carry out the robbery - with weapons and a gun to carry out the robbery, Schwartz and Peters, after the robbery, to meet petitioner and Berenguer, and transfer to the latter two the bag containing the weapons and money (Minutes of April 7, 1971, 2 PM, 8, 11, 17, 18, 19, 20-21, 24-27, 306-310, 338-339, 340, 341, 345).

Schwartz and Peters testified that all the participants in the conference, using two cars, then drove to the bank, in order to execute the robbery, but decided to abandon the project for that day, and returned to petitioner's home, where the weapons and bag were returned to petitioner, and it was agreed that the robbery would be carried out on some future occasion (21-25, 65-66, 308-315, 328, 332-336).

Petitioner's evidence as to the alleged conference of February 3, 1971, and the aborted plan.

Petitioner testified that all that happened at his home that day was that Berenguer - accompanied by Schwartz, Peters and another man--came to petitioner's home (371, 372, 370), asked him whether he, Berenguer, could leave with petitioner, for retrieval at some future time, a bag containing weapons (371, 370, 372, 373), petitioner agreed (373, 374), the bag with the weapons was left with petitioner (375), and the visitors left (375).

The events of February 8, 1971, the day of the actual robbery.

The government's case.

Schwartz and the defendant

Simon (each of whom had pleaded guilty to a lesser charge; see p. 21. supra) testified that on February 8, 1971, they and Berenguer conferred with petitioner at the latter's home (42-44, 161-162, 158-159).

Schwartz and Simon testified that petitioner described the physical lay-out of the bank, outlined the plan for the robbery, and supplied Schwartz and Simon - who were to enter the bank - with weapons and a bag to hold the weapons and proceeds of the robbery, which were, after the robbery, to be transferred to petitioner and Berenguer who would be waiting, in a car, near the bank (44-52, 161-165, 167-168).

Schwartz and Simon testified that all the participants in the conference, using two cars, then drove to the bank (52-53, 169).

Schwartz and Simon entered the bank, carried out the robbery, and took a quantity of cash (55, 56, 173).

Schwartz and Simon testified that the weapons and cash were put into the bag which petitioner had given them, that they entered the car in which they had driven to the bank, met petitioner and Berenguer, who were in another car, down the road, and transferred to the latter two the bag containing the weapons and cash (54-58, 129, 144-147, 173-175, 244-245, to be read with 259-260 and 156-157; 249).

The discovery of the weapons in the back yard of petitioner's home.

The day following the robbery, the weapons were discovered by police in petitioner's back yard, in a metal box

(285-286). The box had petitioner's fingerprints on it (293).

For the exposition of the suspect nature of the government's testimony concerning the search and the discovery, the Court is respectfully referred to petitioner's principal brief in the Court of Appeals, pp. 104-107 (being supplied to this Court as part of the record in the Court of Appeals).

Petitioner's version of the events of February 8, 1971.

Petitioner testified that on February 8, 1971, Berenguer, accompanied by Schwartz and Simon, came to his home, retrieved the articles he had left on February 3, 1971 (376-378), the visitors asked to borrow the car belonging to petitioner's wife (379), petitioner refused (379), and his visitors then left (379). Petitioner did not know that they were going to rob a bank (379).

Petitioner also called two alibi witnesses (350-357, 358-365).

> The government's cross-examination of petitioner concerning his having received "Miranda" warnings from an F.B.I. agent, his interrogation by said agent, and his statements and admissions to said agent, notwithstanding the failure of the government, on its case-in-chief, to adduce any evidence regarding any of said matters, and petitioner's denials that he had either received said warnings or made any statements or admissions concerning the robbery.

Notwithstanding the failure of the government, on its case-in-chief, to adduce any evidence concerning the giving of "Miranda" warnings to petitioner by an F.B.I. agent, or the interrogation of petitioner by said agent, or any state-

ments or admissions made by petitioner to said agent during said interrogation, and notwithstanding petitioner's denials that he had either received such warnings (399-400) or made statements or admissions concerning the robbery (394, 397-406), the trial judge permitted the prosecutor to cross-examine petitioner concerning these matters (394-406).

The "Alice-in-Wonderland" "Miranda" hearing

The trial judge ordered a "Miranda" hearing (Miranda v. Arizona, 384 U.S. 436; 1966) to determine whether the F.B.I. agent referred to, one Daniel Long, had given petitioner the required "Miranda" warnings, so that he, the trial judge, might, in turn, decide whether to

permit Long to take the stand in rebuttal of petitioner's denials that he had received such warnings or had made any statements or admissions concerning the robbery (434-447).

Prior to the hearing, the Court advised defense counsel that he would not believe anything petitioner said at the hearing (433).

Defense counsel observed that there would thus be no point in putting petitioner on (433).

The Court agreed, and added that defense counsel would have to make his case on the hearing through cross-examination of Long, the agent, stating, "I just don't believe your defendant" (433).

At the conclusion of the hearing, the Court asked whether there was anything further, and defense counsel reminded the Court that there was no point in putting petitioner on, in view of the Court's earlier statements, and the Court again agreed with defense counsel (443-444).

Thereupon, the Court -- which had heard only the agent -- ruled that the Miranda requirements had been met (444), and the agent was permitted to testify in rebuttal that he had given petitioner the "Miranda" warnings, and that petitioner had made certain statements and admissions to him concerning the robbery (448 et. seq.).

The fatal omission in the agent's testimony

The agent, Long, according to his rebuttal testimony, did not orally advise petitioner of his "Miranda" rights, but merely exhibited to him a paper specifying said rights (450-452).

Mr. Long, however, failed, in his rebuttal testimony, to give any evidence concerning petitioner's response to the exhibition of said paper (see 452). Or, to put it differently, Mr. Long, in his rebuttal testimony, failed to give any evidence that petitioner either understood the warnings set forth on the paper or waived his rights with respect thereto (see 452).

Notwithstanding these facts, the Court permitted the jury to consider Long's evidence in arriving at its verdict.

Schwartz' and Simon's denials of any promise of consideration in exchange for their cooperation

Schwartz and Simon, as noted, had, prior to the trial, each pleaded guilty to bank larceny -- that is, taking money from the bank with intent to steal same (minutes of March 15, 1971, p. 15), in violation of 18 U.S.C. sec. 2113(b). The indictment charged armed robbery in violation of subds. "(a)" and "(d)".

At the time of the trial (April,1971), neither had been sentenced. They were sentenced in June, 1971 (min-

utes of June 18 and 25, 1971).

At the trial, in answer to questions put to him by the prosecutor, Schwartz and Simon each testified that the prosecutor had not made any promise to him of any consideration in exchange for his cooperation (60, 61, 178).

The sentences imposed upon Schwartz and Simon

Subsequent to the conclusion of the trial (it ended April 9, 1971; A-10, A-60), more particularly, on June 18, 1971, Simon was sentenced (minutes of June 18, 1971), and on June 25, 1971, Schwartz was sentenced (minutes of June 25, 1971).

Schwartz and Simon, it will be

remembered, had each testified that he had committed acts of armed bank robbery alleged in the indictment (55, 56, 173), and so the parties stipulated (294-295).

The crime was and is punishable by a fine of not more than $10,000, and a prison term of not more than twenty-five (25) years. 18 U.S.C. sec. 2113(d).

Simon -- who was 25 years of age (minutes of March 15, 1971, p. 3), and had, at the trial, denied that the prosecutor had promised him any consideration in exchange for his cooperation (178) -- was sentenced pursuant to the Federal Youth Corrections Act, 18 U.S.C. sec. 5010 (a), to five (5) years' probation (minutes of June 18, 1971, pp. 6-8; A-63).

Schwartz -- who was 24 years of age (68), and had, at the trial, also denied that the prosecutor had promised him any consideration in exchange for his cooperation (60, 61) -- was also sentenced under the Federal Youth Corrections Act, 18 U.S.C. sec. 5010(b), "to the custody of the Attorney General . . . for imprisonment" (minutes of June 25, 1971, pp. 11-14, A-62).

18 U.S.C. section 5010(b), the statute under which Schwartz was sentenced, authorizes Schwartz' release, conditionally, under supervison, at any time prior to the expiration of four years, or at the time thereof, and requires his discharge unconditionally at the expiration of six years.

The jury at the trial of petitioner did not and could not know the sentences Schwartz and Simon received, and thus did not and could not take such facts into consideration in weighing the evidence on, and determining, the issue whether either Schwartz or Simon or both had, in fact, notwithstanding their denials, been promised consideration in exchange for their cooperation -- consideration which manifestly each received on his sentence.

The sentencing of each had been deferred until he had given his testimony and the jury had rendered its verdict, because the Court and prosecutor evidently did not trust either Schwartz or Simon to keep his end of the bargain if he were sentenced before the trial of petitioner.

Anomalously enough, however, at that trial, Schwartz and Simon were each offered to the jury as a witness the jury could trust.

> The trial court's "blind", incomplete and partisan response to the jury's request for all the testimony on a vital issue -- a response peculiarly prejudicial to petitioner (see item "4" of the "QUESTIONS PRESENTED", pp. 9-11, supra)

Due to the related circumstances (1) that the facts in support of the heading above -- which pose issue "4" of the "QUESTIONS PRESENTED", pp. 9 - 11, supra -- occupy, because of the multi-faceted nature of the trial court's error or errors, ten (10) pages of petitioner's supplemental brief in

the Court of Appeals (pp. 1-10; a copy of said brief is being filed with this Court as part of the record in the Court of Appeals), (2) it would be impossible to set forth these facts within the compass of this petition without garbling both the facts and the contentions based thereon, and (3) in order to avoid extending this petition to inordinate lengths, the Court's attention is respectfully invited to said statement of facts in said supplemental brief. Since similar considerations apply to the contentions predicated on these facts -- the contentions occupy 6-1/2 pages (supplemental brief,pp. 10-17) -- the Court's attention is also respectfully invited to that portion of said brief, epitomized in issue "4" of the "QUESTIONS PRESENTED", pp. 9-11, supra.

Reasons for Granting the Writ

1. The judgment below should be reversed, because the practice summarized in issue "1" of "QUESTIONS PRESENTED", pp. 4-5, supra, as factually presented at pp. 33-38, supra, (a) is not only in conflict with the due process clause of the Fourteenth Amendment to the Constitution of the United States, to the extent that it affected the substantial right of petitioner to a fair trial (and thus should have been noticed as "plain error" by the Court of Appeals, pursuant to Rule 52b of the Federal Rules of Criminal Procedure, and, it is respectfully submitted, should also be noticed by this Court as "plain error", pursuant to Rule 40(1)(d)(2) of the Rules of this

Court, which apparently applies not only to briefs, but to petitions, as well; Stern and Gressman, Supreme Court Procedure (4th Ed.; 1969), p. 299), but (b) the practice is so widespread throughout the federal and state courts of the country, that the question whether it is constitutional or not -- that is, whether it deprives defendants of a fair trial or not -- cries out for adjudication by this Court.

2. The judgment below should be reversed, because the practice or practices referred to in issue "3" of "QUESTIONS PRESENTED", pp. 5-9, supra, as factually presented at pp. 28-33, supra -- the propriety of which practices were upheld by the judgment below

-- were and are in conflict with the holdings of this Court in Miranda v. Arizona, 384 U.S. 436, as explicated in Harris v. New York, 401 U.S. 222, as well as Harris, supra, itself; but they are also of the kind which are likely to recur with considerable frequency, to the prejudice of other defendants, so that the impermissibility of the practices should be declared by this Court.

3. The judgment below should be reversed, because the practice or practices referred to in issue "4" of "QUESTIONS PRESENTED", pp. 9-11, supra, as factually presented in petitioner's supplemental brief in the Court of Appeals (pp. 1-10), and also argued therein (ibid., pp. 10-17), not only

deprived petitioner of a fair trial, and were and are in conflict with the holding of this Court in Bollenbach v. United States, 326 U.S. 607, as well as with the holdings in Pinckney v. United States, 352 F.2d 69, 70 (5 Cir., 1965), and United States v. Braxton, 417 F. 2d 878, 880 (5 Cir., 1969), but they are also of the kind which are likely to recur with considerable frequency, to the prejudice of other defendants, so that the impermissibility of the practices should be declared by this Court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the

judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

Theodore L. Malatesta
250 Broadway
New York, New York 10038

Counsel for petitioner

April 17, 1972

APPENDIX

Judgment of the Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS
For The
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 18th day of February one thousand nine hundred and seventy-two

Present:

Hon. Wilfred Feinberg, U.S.C.J.
Hon. William H. Timbers, U.S.C.J.
Hon. Roszel C. Thomsen, U.S.D.J.

UNITED STATES OF AMERICA,

Appellee,

-against-

MICHAEL DeTORE,

Defendant-Appellant

Appeal from the United States District Court for the Eastern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was submitted by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court

Court be and it hereby is AFFIRMED

It is further ordered that the mandate of this court issue forthwith.

Wilfred Feinberg

Wm. H. Timbers
U.S.C.JJ.

Roszel C. Thomsen
U.S.D.J.

Certificate of Service

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1971

NO. A-971

MICHAEL DE TORE,
Also Known As MICHAEL
HAYS, Petitioner

v.

UNITED STATES OF
AMERICA, Respondent

I hereby certify that on the 17th day of April, 1972, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Robert A. Morse, Esq., United Statee Attorney for the Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York

11242, counsel for the respondent.

I further certify that all parties required to be served have been served.

Theodore L. Malatesta
250 Broadway
New York, New York 10038

Counsel for Petitioner